

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**APPEAL FROM THE COURT OF APPEALS
SERVITTO (PRESIDING), GADOLA, O'BRIEN**

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

MSC No.
COA No. 322820

v

Circuit Court No. 12-020831-FH

DENNIS KEITH TOWNE,
Defendant-Appellant.

**DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL
FOLLOWING REMAND**

ORAL ARGUMENT REQUESTED

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I. Order Appealed From

Mr. Towne is appealing from a Judgment of Sentence entered in the Livingston County Circuit Court pursuant to a conditional guilty plea.

The Court of Appeals denied leave to appeal (D. Owens, J., dissenting) in an order dated September 17, 2014.

This Court remanded the case as on leave granted.

The Court of Appeals issued an unpublished opinion affirming the trial court's decision regarding the admission of the marijuana evidence on March 10, 2016. Mr. Towne moved for reconsideration, which the Court of Appeals denied on May 3, 2016.

This Court remanded in light of *People v Frederick*, 500 Mich 228 (2017), in an Order entered October 24, 2017.

The Court of Appeals again affirmed on December 19, 2017, in an unpublished Order.

II. Relief Sought

Defendant-Appellant, Dennis Towne, prays that this Court reverse the decision of the trial court, permit Mr. Towne to withdraw his plea, suppress the evidence seized in violation of Mr. Towne's Fourth Amendment rights, and remand for dismissal or, in the alternative, further proceedings.

III. Questions Presented for Review

1. Based on sparse and stale information, police officers approached Dennis Towne's home with an arrest warrant for Mr. Towne's son, Richard Towne. Mr. Towne declined to allow the officers into his home.

Lacking any basis to suspect that Richard was in the home, two of the officers nevertheless sought a search warrant, and one officer took up a position in the backyard, violating the curtilage, to “secure” the home while the police waited for the search warrant. While positioned on the curtilage, the officer smelled burning marijuana coming from the home and determined that exigent circumstances required immediate entry into Mr. Towne’s home. Richard was not in the home. But the police found marijuana, and charged Mr. Towne accordingly.

The trial court should have suppressed the marijuana because the police did not have probable cause to believe that Richard Towne was in the home, did not have a search warrant for the home, did not have a legal justification to “secure” the home, violated the curtilage while securing the home, and cannot use the plain smell or plain view exceptions to the warrant requirement because the information was learned during the unconstitutional violation of the curtilage.

2. The Court of Appeals misapplied *People v Frederick*, 500 Mich 228 (2017) and *Florida v Jardines*, 669 US 1 (2013).

3. The Court of Appeals did not follow this Court’s direction on remand to apply *Jardines*, but altered the factual findings of its previous opinion.

IV. Reasons to Grant Leave

The court rules state that this Court should consider granting leave where

1. “the issue involves a legal principle of major significance to the state’s jurisprudence” MCR 7.305(B)(3);

2. “in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice”. MCR 7.305(B)(5)(a);

3. “in an appeal from a decision of the Court of Appeals, the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals;”. MCR 7.305(B)(5)(b).

This Court and the U.S. Supreme Court have considered several knock-and-talk cases over the past five years, making it imperative that it take Mr. Towne's case to maintain a consistent jurisprudence on the issue throughout the state's case law. See *People v Michael Radandt* (MSC Docket No. 150906); *People v Van Doorne*, (Docket No. 153117); *People v Frederick*, (Docket No. 150546).

First, the Court of Appeals premised its holding on a misunderstanding of the record. When undersigned counsel combed the record following issuance of the opinion to see if he had missed something and hesitantly filed his motion for reconsideration, waiting to see if the prosecution would find some piece of evidence that he had missed, he was both relieved and disturbed to discover that he had not misread the factual record. The prosecution had no sound response to support the Court of Appeals' misreading of the record. This misreading has worked a material injustice in this case.

Second, the Court of Appeals decision is a poor application of the principles involved in knock-and-talk cases. It muddles the case from top to bottom, and where this Court is trying to clean up the jurisprudence in this area following *Florida v*

Jardines, 569 US 1 (2013), it should not permit the opinion in this case to stand as an outlier, confusing litigants.

Finally, rather than apply *Jardines* properly, the Court of Appeals attempted to clean up its erroneous factual findings, to no avail.

V. Statement of Facts

Defendant-Appellant, Dennis Towne, entered a conditional plea to Delivery/Manufacture of a Controlled Substance (Marijuana). MCL 333.7401(d)(2)(iii). He was sentenced to 12 months' probation and various fines and costs.

On December 15, 2011, the police, acting on limited and stale information, sought to arrest Mr. Towne's son, Richard, at Mr. Towne's home. The police used a "knock and talk" procedure, knocking on the front door and asking if Richard was home. Unfortunately, the police failed to legally execute the knock and talk; rather they *simultaneously* crept around the backyard, onto the deck, and shined a flashlight into the family room. The violation of the curtilage without probable cause and exigent circumstances rendered the later "plain smell" of marijuana burning in the fireplace an unconstitutional search. Still without a search warrant, and having violated the curtilage, the police entered Mr. Towne's home to prevent further burning of marijuana and preserve evidence. But the constitutional die had been cast: the police could not rely on the plain smell exception to the warrant requirement because it was itself part of an illegal entry into the curtilage.

And the police confirmed what Mr. Towne had been telling them all along: Richard was not at their home and did not live there anymore. Mr. Towne had been

burning marijuana scraps (roots, branches) so that they would not count against his legally permitted inventory amount under the Medical Marihuana Act.

Mr. Towne filed a Motion to Suppress in the Livingston County Circuit Court, the Hon. Michael P. Hatty presiding, and an evidentiary hearing was held on February 26, 2013, March 26, 2013, and April 1, 2013. The trial court made findings on the record (4/1/13 T pp. 45-50) and denied the Motion. *See* 4/1/13 Order.

V.A Mr. Towne's home was on a secluded, wooded lot which gave them full privacy expectations in their curtilage.

Dennis and Judy Towne had been married for 31 years.¹ They lived at 6524 Cunningham Lake Road for 15 years.² When they bought the property, it was all wooded, and they cleared an area for the house, and installed some decks and a pool.³ They planted some trees for privacy; erected a greenhouse; installed some fire pits; and placed a glider swing by the stream, all in the backyard.⁴ They used the backyard for intimate, personal activities.⁵ The yard goes from "grass to cleared areas to woods" and has some trees in the cleared area.⁶

The cleared area was maintained by Mr. Towne.⁷ Richard did not live with them; he lived up north⁸ and had last been at their home November 5, 2011, for Mrs. Towne's

¹ 2/26/13 T, pp. 28-29.

² 2/26/13 T, p. 30; 3/26/2013 T, p. 4.

³ 2/26/13 T, pp. 30-31.

⁴ 2/26/2013 T, pp. 31-42. 3/26/2013 T, p. 6.

⁵ 2/26/2013 T, p. 42. 3/26/2013 T, pp. 9-10.

⁶ 2/26/2013 T, p. 77.

⁷ 2/26/2013 T, pp. 42-47, 79. 3/26/2013 T, pp. 8-9.

⁸ 2/26/2013 T, p. 53.

birthday.⁹ Richard had last lived with them in 2006 or 2007.¹⁰ Richard had a couple cars stored on the property, sitting in some long grass; one without a plate and one that could not be driven.¹¹

V.B The troopers arrive at Towne's home

On the night of December 15, 2011, it was cold, they did not have power, and the fireplace was lit.¹²

Troopers Henderson, Pendergraff, Sura, and Keller appeared, without warning, on the porch of the Townes' home to speak to the homeowner about a fugitive. The troopers were looking for fugitive Richard Towne¹³. Mrs. Towne could see an officer on the deck, shining his flashlight, while her husband was outside talking to another officer.¹⁴

Pendergraff said he had a right to enter the home because he had an arrest warrant, but declined to produce the warrant on request.¹⁵ Mr. Towne called his sister, a lawyer, and she said she didn't think that Mr. Towne was obliged to let the officers in; Pendergraff spoke to her on the phone and told her that she needed to tell him to let him search the home.¹⁶ Mr. Towne told Pendergraff that if he got a search warrant, he could search the home; Pendergraff said he would get one and come back.¹⁷

⁹ 2/26/2013 T, p. 54.

¹⁰ 2/26/2013 T, p. 55. 3/26/2013 T, p. 18.

¹¹ 2/26/2013 T, p. 55. 3/26/2013 T, p. 20.

¹² 2/26/2013 T, p. 56. 3/26/2013 T, pp. 17, 60.

¹³ Preliminary Exam Transcript, Vol. I (PET1), at 19.

¹⁴ 2/26/2013 T, p. 57-58.

¹⁵ 3/26/2013 T, p. 22.

¹⁶ 3/26/2013 T, p. 24.

¹⁷ 3/26/2013 T, p. 25.

Pendergraft left, but other officers stayed. Mr. Towne and Mrs. Towne both ordered the officers to leave, but they refused.¹⁸

After the officers left, Mr. Towne began to burn some trimmings and roots and branches of marijuana because he didn't want it counted against the inventory of what he was allowed to possess.¹⁹ It was parts of the marijuana plant that he already intended to destroy.²⁰ He already had a large fire going in the fireplace before the officers arrived.²¹ He was able to burn about half of a 20 gallon tote before the police entered his home.²²

V.C The police had insufficient reasonable and articulable facts to believe that Richard Towne was in the home.

Prior to arriving at the Towne home, the facts that the troopers possessed supporting the assertion that Richard Towne may have been present at that residence were scant:

1. Richard Towne was a fugitive;²³
2. The troopers knew what Richard Towne looked like;²⁴
3. According to CLEMIS, Richard Towne had lived at 6524 Cunningham Lake Road at some point in the distant past (around 2006 or 2007 according to uncontradicted testimony at the evidentiary hearing).²⁵

¹⁸ 2/26/2013 T, p. 72; 3/26/2013 T, p. 26-27.

¹⁹ 3/26/2013 T, p. 35.

²⁰ 3/26/2013 T, p. 38-39.

²¹ 3/26/2013 T, p. 36.

²² 3/26/2013 T, p. 40.

²³ PET1 at 19.

²⁴ PET1 at 65.

²⁵ 3/26/2013 T, p. 53, 56.

4. Richard's old Michigan state ID card had the 6524 Cunningham Lake Road address, but they did not know when that card was issued, and were not sure when it expired.²⁶
5. There was a vehicle parked on the Towne property that was registered to Richard Towne and sitting in some long grass;²⁷ and
6. Richard had allegedly been in the area within the past month or six weeks.²⁸

On the other hand, the facts that the troopers possessed tending to show that Richard Towne was not at that address were more significant:

1. None of the troopers had personally witnessed Richard Towne at 6524 Cunningham Lake Road;²⁹
2. The troopers didn't know Richard Towne's official address per the Secretary of State, nor did they know "the official residence where he actually sleeps every night";³⁰
3. The troopers didn't know how accurate the information in CLEMIS was at the time when they went to 6524 Cunningham Lake Road;³¹
4. Richard Towne's driver's license listed an altogether separate official address;³²
5. A brief investigation revealed that Richard Towne had lived at several other addresses since he had last had contact with law enforcement;³³
6. No witness of any sort indicated that Richard Towne had been at 6524 Cunningham Lake Road in recent weeks or months; and
7. Prior to December 11, the troopers made trips to 6524 Cunningham Lake Road and did not see Richard Towne or a person resembling Richard Towne at the residence.

²⁶ 3/26/2013 T, p. 56, 87.

²⁷ PET1 at 22; 3/26/2013 T, pp. 20, 59-60; 2/26/2013 T, p. 55.

²⁸ PET1 at 20; 3/26/2013 T, p. 58.

²⁹ 3/26/2013 T, pp. 88-91.

³⁰ PET1 at 75-76.

³¹ PET1 at 77.

³² 3/26/2013 T, p. 57.

³³ PET1 at 20.

8. Pendergraff did not talk to neighbors, do any surveillance, drive by the home, and received no tips that Richard was in the home.³⁴

These were the only facts regarding Richard Towne and his possible location that the troopers possessed when they went to speak to the Townes. In short, when the troopers went to 6524 Cunningham Lake Road, they were simply conducting a trial-and-error investigation – going from past address to past address to try and find him.³⁵

V.D The troopers make contact with Towne

Armed with these scant facts, the troopers appeared on the porch at 10:15 at night and knocked on the door of 6524 Cunningham Lake Road. Troopers Henderson and Pendergraff were on the porch, while Troopers Keller and Sura walked around to the back of the home.³⁶ Trooper Pendergraff knocked on the front door and within 5-10 seconds Dennis Towne, Richard Towne's father, partially opened the door, walked outside, and closed the front door behind him.³⁷ The power was out that night and it was freezing outside, hence the reason Dennis Towne closed the door behind him – in order to prevent as little heat as possible from escaping out of the open doorway.³⁸ The troopers nevertheless found the fact that Towne closed his door quickly behind him to be "very suspicious."³⁹

³⁴ 3/26/2013 T, pp. 91-92.

³⁵ 3/26/2013 T, pp. 53-56. Rather than cite to evidence, Trooper Pendergraff seemed to rely on some hunch that adult children move home when "they have nowhere else to go" without any evidence of whether Richard Towne had done (or was even welcome to do) so.

³⁶ PET1 at 72-73; 3/26/2013 T, p. 61.

³⁷ 3/26/2013 T, pp. 18, 64.

³⁸ PET1 at 23; PET2 at 72-73. This is contrary to Trooper Henderson's unsupported assertion that Towne squeezed out of the door and closed it quickly in order to try to hide something.

³⁹ PET1 at 81; 3/26/2013 T, p. 64-65. The troopers' basis for finding this suspicious was based on stereotypes of the behaviors of citizens of different counties. At least one trooper suggested that in "Wayne County" this would be normal but this being Livingston County, it was suspicious.

When Towne stepped outside, Henderson didn't hear any whispering, nor did he hear any statements coming from inside the house, i.e. he didn't hear anyone say "go hide," or "get out of here," or "go duck," or "hide the stuff".⁴⁰ Pendergraff, who was also standing on the porch, didn't hear anyone whom he believed to be Richard Towne, didn't hear evidence of "someone running or thrashing about inside the home," didn't hear any "radio reports of a man that was running or trying to leave the house or trying to escape," nor did he hear "anybody say anything such as hide or Richard get out of here."⁴¹ In sum, while standing on the porch, there was no indication whatsoever that Richard Towne was inside the home.

At this point Pendergraff informed Towne that the troopers were there because there was a ten-count felony warrant for his son, Richard Towne – although the troopers never showed this warrant to Towne, and in fact weren't even in possession of said warrant.⁴² At some point Pendergraff "verbally ordered [Towne] to stay [on the porch] and talk with him for [15-20 minutes]."⁴³ During the course of this conversation, Towne informed the troopers that his son, Richard Towne, was not there – nor had he seen him.⁴⁴ Further, Towne informed the troopers that Richard had not been there in quite a while. During the 20 minutes that Towne was ordered to stay outside and converse, the troopers did not garner a single fact which would indicate Richard

Regardless, a homeowner closing the door behind him in Michigan in December and not inviting the police into his home is not an articulable fact that can support any search or seizure.

⁴⁰ PET1 at 79.

⁴¹ PET2 at 851 3/26/2013 T, p. 101-02.

⁴² PET1 at 19, 25, 82-83; PET2 at 60.

⁴³ PET2 at 83, 96.

⁴⁴ PET1 at 25; PET2 at 87.

Towne was in the home.

In fact, the troopers didn't see, hear, or gather a single fact which would lead any rational person to believe that Richard Towne was at that home. They didn't see Richard Towne or anyone that resembled Richard Towne;⁴⁵ they didn't see anyone other than Dennis Towne, his wife (Judith Towne) or his daughter (Katherine Towne);⁴⁶ they didn't hear anyone inside that they thought might be Richard Towne; they didn't see any furtive gestures by anyone inside the home; they didn't hear any radio traffic in which another officer claimed to have seen Richard Towne.⁴⁷

In response to being told that Richard Towne was not there and had not been there in quite a while, the troopers asked if they could look around Towne's house. Towne exercised his Constitutional rights and denied entry to his home, although there is nothing to suggest that his denial was anything more than a respectful declination.⁴⁸ In response, Pendergraff threatened to go get a search warrant unless the troopers were given access to the home: "I told him again we weren't going [a]way one way or another either you let—give us permission to go in or I'm gonna go get a search warrant for a body for the house . . . "⁴⁹ Again, Towne declined to allow the troopers into his home.⁵⁰ Ultimately, Towne told the troopers to get off of his property (which was well before Henderson claims to have smelled marijuana.)⁵¹

⁴⁵ PET1 at 70.

⁴⁶ PET1 at 71.

⁴⁷ PET1 at 70.

⁴⁸ PET1 at 26; PET2 at 59, 87; 3/26/2013 T, p. 66.

⁴⁹ PET1 at 26; PET2 at 60-61.

⁵⁰ PET1 at 26; PET2 at 87; US Const, Am IV.

⁵¹ PET2 at 90, 93.

Yet, the troopers persisted,⁵² despite a number of factors: (1) despite never getting a visual of Richard Towne at the home; (2) despite specifically being told by Towne that Richard Towne was not there; (3) despite an absence of evidence that the vehicles that were sitting in the driveway and sitting in long grass that were registered to Richard Town were currently in use; (4) despite not seeing Richard Towne at that address within the past seven to ten days; (5) despite an absence of police reports or “BOL’s” regarding Richard Towne at that address; (6) despite a lack of surveillance producing any actual signs that Richard Towne had been at that address; (7) despite the lack of a tip from someone known or unknown that Richard Towne had been at that address; (8) despite the fact that Trooper Henderson didn’t know if 6524 Cunningham Lake Road was Richard Towne’s legally registered address with the Michigan Secretary of State; and (9) despite the fact that Richard Towne’s address on his driver’s license was not 6524 Cunningham Lake Road.⁵³

V.E Keller and Sura are sent around to the back of the home

Despite all of the factors indicating that Richard Towne was not at the home, Troopers Keller and Sura walked around the house – into the side yard – and went around to the back of the house – again, despite a lack of a visual on Richard Towne and despite being informed by Dennis Towne that Richard Towne was not there.⁵⁴ In fact, Pendergraff confirmed that Officers Keller and Sura were already around and in Towne’s backyard *at the time that the troopers knocked on the front door*: “...a couple

⁵² PET2 at 87-88.

⁵³ PET1 at 23, 25, 70, 76; PET2 at 74-76, 79-81; 3/26/2013 T, p. 86..

⁵⁴ PET1 at 25, 70, 72-73; PET2 at 74.

people in the back and two people in front knock.”⁵⁵ Further, “Trooper Sura and Trooper Keller I can’t tell you exactly where they were, but they were somewhere in the rear of the house.”⁵⁶ Additionally, “I believe I probably told [Sura and Keller] to [go around back] while me and Trooper Henderson were walking up to the front door.”⁵⁷ All of this was done in the absence of a search warrant.⁵⁸

V.F The troopers disperse

The conversation between Towne and the troopers ended with Pendergraff informing Towne that they were going to stay and “secure” the home until another officer came with a search warrant.⁵⁹ Supposedly Troopers Pendergraff and Sura then left to go secure a search warrant, while Troopers Henderson and Keller stayed behind at the house (although the search warrant affidavit that was submitted to Judge Carol Reader intimated that it was Sura who stayed behind with Henderson.)⁶⁰

Importantly, between the time the four troopers arrived at the house and the time that the search warrant was signed, which was approximately 3-4 hours, none of the troopers witnessed Richard Towne within the home or anywhere on the property nor was there any indication that Richard Towne was present at the home – despite the four troopers being trained to spot fugitives.⁶¹

V.G Trooper Henderson walks through Towne’s backyard

⁵⁵ PET2 at 58.

⁵⁶ PET2 at 59.

⁵⁷ PET2 at 84.

⁵⁸ PET2 at 84.

⁵⁹ PET1 at 26.

⁶⁰ PET1 at 26; 3/26/2013 T, p. 67.

⁶¹ PET1 at 70.

Nevertheless, Trooper Keller took up a position in the front of the house and Trooper Henderson took up a position “at the back of the house.”⁶² Henderson got to this position by walking across the Towne's property [to the side of the house].⁶³ Specifically, Henderson walked “from the patrol car from where the patrol car was across the rest of the driveway meaning past the garage door...*Through the backyard...Past the greenhouse...and then [I] walked further through the backyard.*”⁶⁴ (emphasis added). Then Henderson walked “away from the house” towards the “Northeast corner of the house property...”⁶⁵ In fact, Henderson concedes that “*the path [he] took was through the Towne's backyard.*”⁶⁶

V.H Henderson positions himself in Townes' backyard

According to Henderson, he went around to the back of the house “due to there are a number of exits [from the house]” and “it's not uncommon that people hear that we have a search warrant and shortly after the police leave they take off...We could cover all corners of the house basically to see if anybody would take off and flee at that point.”⁶⁷ Further, Pendergraft stated that he was concerned: “...if the kid's hiding in the house and we all leave he's obviously going to leave...I mean he could jump out of a window anything.”⁶⁸ Then Pendergraft stated that he feared for officer and public safety.⁶⁹

⁶² PET1 at 27.

⁶³ PET2 at 4.

⁶⁴ PET2 at 7-8.

⁶⁵ PET2 at 8.

⁶⁶ PET2 at 8.

⁶⁷ PET1 at 27; PET2 at 34; 3/26/2013 T, p. 68.

⁶⁸ PET2 at 62.

⁶⁹ PET2 at 68, 95; 3/26/2013 T, p.68.

Due to these alleged “exigent circumstances,”⁷⁰ Henderson “positioned himself to the one corner of the house . . . and the complete rear of the house which would be the walkout basement area, the deck, and the garage area that was to the one side of the house.”⁷¹ *Most importantly, Henderson took a position “in the backyard.”*⁷² He was standing *between* the house and the evergreen trees that they planted for more privacy around the house, where the property was maintained and used in their daily activities.⁷³ From this position “*in the backyard*,” according to his estimate, Henderson was within 25 yards from the house, the deck, the garage, a greenhouse, and the pool.⁷⁴ However, Henderson was only a mere 3-7 yards away from the pool when he was standing in the backyard.⁷⁵ Henderson was also near a fire pit and a glider swing that is frequently used by the Townes.⁷⁶ Even the prosecution, in its questioning of Mrs. Towne, assumed that Henderson was within the sparse, “cleared area” of the lawn:

Q. And would you also agree that if Trooper Henderson were to stand behind the area where it becomes more dense that he would have trees blocking his vision of your house?

A No, they're pretty thin there.[⁷⁷]

Ultimately, despite the fact that Henderson wasn't sure exactly where he was standing, it is quite clear that he was standing in the maintained area of the backyard.⁷⁸ Plus, from this position in the “tree line,” Henderson could see many things

⁷⁰ As cited by the Prosecution at PET2 at 55.

⁷¹ PET1 at 28.

⁷² PET1 at 85.

⁷³ 2/26/2013 T, pp. 15-17, 81-82.

⁷⁴ PET1 at 29, 85-86.

⁷⁵ PET2 at 16.

⁷⁶ 2/26/2013 T, p. 81.

⁷⁷ 2/26/2013 T, p. 78.

⁷⁸ PET2 at 37.

associated with the privacy inherent in a secluded back yard: (1) a deck; (2) a pool; (3) a greenhouse; (4) a cement sidewalk; and (5) a grill.⁷⁹ Further, there were other things in and around the area where Henderson was standing that he may not have seen, such as fire pits, campsites, picnic tables, or property stored back there.⁸⁰

Additionally, upon taking up a position "*in the backyard*," Henderson stated that he could see directly into the house:

...there was a very large deck that covered the back portion of the house. It was a very large deck that pretty much surrounded the living room portion that you could see into the front hallway where the door was. The actual living room portion of the house, partially down the hallways to the left and the right which would be toward the garage and to the side of the house and also the open kitchen that was right there...⁸¹

Trooper Henderson could allegedly see all of this from the "back of the house," at night, from "20 yards, 25 yards from the house," and 10 to 20 feet away from the pool, into a house which had no lights on because the power was out.⁸²

V.I From his position in Towne's backyard, Henderson smelled marijuana

After standing in the tree line, in the "extreme[] cold," for approximately 45-50 minutes, not moving "hardly at all," and while "*in the backyard*," Henderson stated that he could also see "smoke coming out of the chimney,"⁸³ which is something that one would expect to see coming out of the chimney of a fireplace of a house that has no power (and therefore no heat) in a Michigan winter. From this position at the "back

⁷⁹ PET2 at 30-31.

⁸⁰ PET2 at 43-44.

⁸¹ PET1 at 27.

⁸² PET1 at 23, 29; PET2 at 16.

⁸³ PET1 at 29; PET2 at 33-34, 36.

of the house,” Henderson also, for the first time, smelled “freshly burned marijuana.”⁸⁴

Henderson also saw light emanating from the fireplace⁸⁵ – again, something that one would expect to see coming from a fireplace in a house without power and heat in winter. While Henderson was witnessing all of this from the “back of the house,” Keller was sitting inside of his police vehicle.⁸⁶ At this point, Henderson proceeded to walk onto the “porch,” or back deck, so that he could see exactly what was going on inside the house.⁸⁷ From this vantage point on the back deck, Henderson witnessed Towne burning what he believed to be marijuana.⁸⁸ At this point Henderson met Keller at the corner of the house and the two troopers spoke about Henderson’s observations.⁸⁹

V.J Henderson lacked a search warrant

Henderson took all of these actions and saw everything that he described (walking through the backyard, standing in the backyard, walking onto the back deck, looking into the house) without a search warrant.⁹⁰ Further, this was not the first time that these troopers had been out to this house looking for Richard Towne.⁹¹ In fact, on a previous occasion, the troopers had been out to that house, had walked around to the back of the house, had walked into the backyard, and had gone up onto the deck, and had looked into the windows of the home – all without a search warrant.⁹²

⁸⁴ PET1 at 29, 91; 3/26/2013 T, p. 57..

⁸⁵ PET1 at 30.

⁸⁶ PET1 at 41, 92.

⁸⁷ PET1 at 41.

⁸⁸ PET1 at 41, 91; 3/26/2013 T, p. 69.

⁸⁹ PET1 at 92.

⁹⁰ PET2 at 9.

⁹¹ PET2 at 23, 78. Henderson and Pendergraft admitted that they had been to the property in the past – although Henderson made no mention of ever seeing Richard Towne at the residence during their previous visit. Further, Pendergraft made several admissions of curtilage violations.

⁹² PET2 at 78.

Ultimately, Henderson and Keller attempted to kick the door in, and broke the side window before Towne reached the door and opened it for them.⁹³ Troopers then searched the house and confirmed what Towne and his wife, Judith, had already told them: that Richard Towne was not at the home.⁹⁴ Following a safety sweep of the house, officers searched the entire house looking for marijuana.⁹⁵

V.K The trial court's findings

At the conclusion of the proofs, the trial court made the following findings on the record:

Thank you. This case -- I think the first thing we should look at is the -- first of all, this is a case -- a motion to suppress and dismiss brought by defense counsel on behalf of Dennis Keith Towne. I think it is good practice first to look at the Fourth Amendment of the constitution. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue (inaudible) probable cause supported by oath or affirmation and particularly ascribing the place to be searched and the persons or things to be seized.

That being said, a search without a warrant is, per se, unreasonable unless there is a valid exception to the Fourth Amendment. One of the exceptions to the Fourth Amendment is exigent circumstances. What -- the long and the short of it is here is that there is four state police troopers with an arrest warrant for the junior Towne, Richard Towne, and they've got, they being the police, have knowledge or belief or some kind of information that young Richard Towne is a fugitive from Crawford County, there's an arrest warrant for him, and there's reason to believe that he's at 6524 Cunningham Lake Road.

The officers go to 6524 Cunningham Lake Road in Livingston -- Livingston County, and I believe that's in Brighton Township -- Hamburg Township, which for the sake of all parties, Hamburg Township and Brighton Township are contiguous. They -- they share a common border. But anyway, the police go there and based on the fact that there's police contact that Richard Towne had with the police before and they believe

⁹³ PET1 at 42-44.

⁹⁴ PET1 at 25, 45; 3/26/2013 T, p. 71..

⁹⁵ PET1 at 54-56.

that he's in the area, they go to the father's house, Dennis Towne's house, on Cunningham Lake Road. I should also state there's a -- one driver's license has an address up north; a state ID has an address down here in Livingston County for Richard Towne.

The police go to the Cunningham Lake Road address, they at one point see one car there that's registered to Richard Towne, another time they see two cars there. Whether or not they're operable or not and how they got there is not of consequence to the Court, but there's evidence of this younger Towne being in Livingston County. The troopers one of 'em goes to the front door and meets with Richard Towne. Richard Towne chooses not to let the officers in and says that Richard Towne is not there, does not live there. I fully respect Mr. Dennis Towne's right to come outside of his house and to not invite the officers in. Mr. Dennis Towne, the Defendant herein, does not have to let those officers into his house if he doesn't choose to and he's more than welcome to stand on the front of his porch and discuss whatever he wants to with the officers at that point.

The officers, for the reasons I stated earlier, believed that there -- that Richard Towne may be there. They got an arrest warrant. They have, because of the actions that had the discussions they had with Richard Towne the officers believed that Richard Towne is on that premises. The officers then go and two of 'em leave the Towne property on Cunningham Lake Road to secure a search warrant from a warrant -- strike that, from a magistrate or district court judge. The Court -- this Court will note that the right thing to do is not to break into that house but to go follow the spirit and the direction of the Fourth Amendment in seeking a warrant from a magistrate describing that which is to be searched and seized as the Fourth Amendment requires.

The police, the two remaining police officers, Michigan State troopers, secure the residence so that if the younger Towne who the original arrest warrant for wishes to flee, the officers will at least be able to intercept that individual while the other two officers are getting a search warrant.

Now that then puts -- now the question becomes a little bit more focused. Can the officers secure the residence while awaiting for the other officers to get the search warrant. And this Court believes that the actions of the state police in taking up positions around that property in order to make sure that if there is a fleeing -- or a felon in there that they have an arrest warrant for doesn't flee was not a violation of the law of the State of Michigan or of the United States Constitution. Those officers waited to secure that property while the other two officers were seeking out a magistrate or district court judge to get a warrant which which the framers of the constitution placed into -- into American law.

So what happens next. I believe that the officers lawfully were on that premise. They were on the edge, outer edge of the back property that apparently standing in the woods or 25 yards away from that home. And I have in other occasions found that there have been curtilage violations if officers have, like, gotten inside of wooden fences, areas that are so intimately associated with the house and maybe spotted a marijuana plant, I have suppressed those in the past. But in this case you have an officer that is standing far away from the house near the edge of the woods, and that now becomes a very important part of this case. That officer was able to smell what he believed to be marijuana. There may have been a bright light, but I also think of the fire being -- fireplace being -- being lit up but I'm not so concerned about fire in the fireplace being seen. What I -- what I think gave the officers probable cause to believe that evidence was being destroyed is when they could smell the marijuana being burned from being outside.

I believe the officer in the backyard was lawfully there to protect against a fleeing felon, and when he smelled marijuana that gave him probable cause to believe that evidence was being destroyed and at that point the officers do not have to sit idly by waiting for a warrant, a search warrant to come back to them, when they can see evidence being destroyed. At that point I believe exigent circumstances existed that would permit the officers to then stop the destruction of that evidence. Oddly enough if there was no fire and no smoke the officers may not have had a reason to believe that evidence was being destroyed because they wouldn't have smelled any burning marijuana coming up through that chimney, and at that point if -- we're never gonna know what happened if they didn't burn any marijuana.

If they had a search warrant and they went through the house found no Richard Towne it would be -- this matter would never have got to me got to this Court for these issues. But in this case the officers were there to execute an arrest warrant, they weren't allowed into the house, they did what they were supposed to do which was go ask a district court judge or a magistrate for a search warrant and while they were waiting - - while they had the premises under surveillance for the return of that search warrant they were confronted with destruction of evidence. That to me is exigent circumstances of the evidence being destroyed, and the officers acted lawfully in order to preserve -- strike that, stopped the destruction of the evidence.

So for those reasons, I deny the Defendant's motion to suppress the evidence.^[96]

⁹⁶ 4.1.2913 T, pp. 45-50.

The Court of Appeals declined an interlocutory appeal and denied leave to appeal following a conditional plea, with Judge Owens dissenting.

Mr. Towne sought leave to appeal to this Court, which remanded to the Court of Appeals as on leave granted. The Court of Appeals affirmed the trial court's decision in an unpublished decision and denied a motion for reconsideration.

Folooing this Court's second order of remand to consider the case in light of *People v Frederick*, 500 Mich 228, (2017), the Court of Appeals again affirmed.

Mr. Towne requests leave to appeal.

VI. ARGUMENT

VI.A. Standard of Review and Issue Preservation

We review de novo a trial court's ultimate decision on a motion to suppress. *People v Frohriep*, 247 Mich App 692, 702, 637 NW2d 562 (2001). However, we review the trial court's findings of fact for clear error. *Id.* A finding is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *Id.* This Court must give deference to the trial court's factual findings, particularly where the credibility of witnesses is involved. MCR 2.613(C); *People v Farrow*, 461 Mich 202, 209, 600 N.W.2d 634 (1999). Accordingly, we may not substitute our judgment for that of the trial court and make independent findings. *Id.* It is the prosecutor's burden to show that a search and seizure challenged by a defendant were justified by a recognized exception to the warrant requirement. *People v Wade*, 157 Mich App 481, 485, 403 NW2d 578 (1987).

People v Galloway, 259 Mich App 634, 638 (2004).

This issue was preserved by a conditional plea. There has bee no question that the issue was preserved during the appellate process.

VI.B Summary: The Police were trespassing without a warrant or probable cause and exigent circumstances, which are necessary even *outside* the curtilage.

There are many threads to be pulled and examined in this case, but it seems to come down to this:

1. The police had an arrest warrant for a third-party, which according to U.S. Supreme Court precedent, did not permit them to search the Townes' home.
2. Without a search warrant, the police could only approach the home according to established knock-and-talk rules, which permit approach along established public paths.
3. The police indisputably departed from the knock-and-talk rules byt going around back of the house, at night during a power outage, and shining flashlights in the home.
4. Mr. Towne expressly ordered the police to leave, which they did not do, making them trespassers at Mr. Towne's property.
5. *After* these violations, Det. Henderson went around the backyard and waited for a warrant.
6. Det. Henderson was not justified in setting up a post in the backyard because he had no warrant, was a trespasser, and did not have bothe probable cause and exigent circumstances.
7. The record clearly discloses that the police saw or smelled burning marijuana from a position that they had no legal right to be, thus vitiating any claim to the plain view or plain smell doctrines.

The Court of Appeals in its first opinion failed to read the record properly, leading to a factual error that infected its legal analysis. In its opinion on remand, the

Court of Appeals misleadingly focused on the path that Det. Henderson took through the backyard to find that he never violated the curtilage, without analyzing the key question of whether the police had probable cause and exigent circumstances to trespass in the first instance.

VI.C *Jardines and Frederick*

This case has been ongoing for about six years, most of them in the appellate courts following Mr. Towne's conditional plea. Mr. Towne should have won on the suppression issue years ago, but *People v Frederick*, 500 Mich 228 (2017), and *Florida v Jardines*, 569 US 1 (2013), bring the strength of his case into greater relief.

That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.

Florida v Jardines, 569 US 1, 11; 133 S Ct 1409, 1417; 185 L Ed 2d 495 (2013). *Jardines* varies from Mr. Towne's case as the police were investigating a suspected crime, not pursuing an arrest warrant as in Mr. Towne's case. But *Jardines* is still helpful because its rule coupled with the law and discussion below, establish that the police cannot invade the curtilage without triggering both the protections of the Fourth Amendment and the rights against unreasonable searches. As mentioned above in the Summary, the police in Mr. Towne's case were trespassing on the property. *Jardines* stands for the proposition that the police cannot take advantage of a public license to be within the curtilage and *expand* that license on their own authority. The authority to expand the license is entirely the homeowners'

In *Jardines*, the police had some suspicion of drugs in the home and approached the front door, used a canine sniff, and after the results were positive, only then did the police seek a search warrant.

The U.S. Supreme Court held that this intrusion exceeded the license that police (and regular citizens) have when approaching a home:

While law enforcement officers need not “shield their eyes” when passing by the home “on public thoroughfares,” *Ciraolo*, 476 U.S., at 213, 106 S.Ct. 1809, an officer’s leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment’s protected areas. In permitting, for example, visual observation of the home from “public navigable airspace,” we were careful to note that it was done “in a physically nonintrusive manner.” *Ibid.* *Entick v. Carrington*, 2 Wils. K.B. 275, 95 Eng. Rep. 807 (K.B. 1765), a case “undoubtedly familiar” to “every American statesman” at the time of the Founding, *Boyd v. United States*, 116 U.S. 616, 626, 6 S.Ct. 524, 29 L.Ed. 746 (1886), states the general *8 rule clearly: “[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave.” 2 Wils. K.B., at 291, 95 Eng. Rep., at 817. **As it is undisputed that the detectives had all four of their feet and all four of their companion’s firmly planted on the constitutionally protected extension of Jardines’ home, the only question is whether he had given his leave (even implicitly) for them to do so. He had not.**

Florida v Jardines, 569 US 1, 7–8; 133 S Ct 1409, 1415; 185 L Ed 2d 495 (2013).

This last two sentences are directly applicable to Mr. Towne’s case: not only did the police move around the backyard *during* the knock and talk. **They remained on the property after Mr. Towne had ordered them to leave** (discussed more below).

This Court further interpreted and applied *Jardines* in *Frederick*. Expanding on the the license to be on the citizen's property, this Court held that the knock-and-talk license does not extend into nighttime hours:

We believe, as the Supreme Court suggested in *Jardines*, that the scope of the implied license to approach a house and knock is time-sensitive. *Id.* at —, 133 S.Ct. at 1416 n. 3; *id.* at —, 133 S.Ct. at 1422 (Alito, J., dissenting). Just as there is no implied license to bring a drug-sniffing dog to someone's front porch, there is generally no implied license to knock at someone's door in the middle of the night. See *id.* at —, 133 S.Ct. at 1416 (opinion of the Court) ("There is no customary invitation to do that.").

People v Frederick, 500 Mich 228; 895 NW2d 541, 546 (2017). The police in Mr. Towne's case not only approached at night, they approached during a poer outage. They did not approach to check on the health and well-being of the residents during the outage – in fact, they exacerbated the discomfort of a power outage by confronting the Townes with an arrest warrant for their son, shining lights into their house from the back deck, and refusing to leave when ordered. The license for public visitors does not extend to such harassing behavior.

When the officers stray beyond what any private citizen might do, they have strayed beyond the bounds of a permissible knock and talk; in other words, the officers are trespassing.

People v Frederick, 500 Mich 228; 895 NW2d 541, 546 (2017). The *Frederick* court went on to explain that if Girl Scouts can understand these rules, the police should, too.

The next step according to *Frederick* is whether the police were seeking to find something or to obtain information, such that the Fourth Amendment is implicated.

People v Frederick, 500 Mich 228; 895 NW2d 541, 547 (2017). (cleaned up). It is indisputable that the police in this case were seeking something: the Townes' son, and they were looking in the house and setting up a perimeter to do so. The

Frederick court concluded that seeking permission for the search does not change the analysis. *Id.*

The *Frederick* court examined the consent of the defendants in that case, but it is again undisputed that there was no consent in Mr. Towne's case, which makes it stronger still.

The Court of Appeals failed to apply *Frederick*, *ardines*, or the full body of Fourth Amendment and knock-and-talk law. Instead, it reaffirmed the same faulty analysis that it used in the first opinion.

Specifically, the Court of Appeals simply repeated **the same factual error** that was the basis of Mr. Towne's original Motion for Reconsideration and the basis of his argument in this Court (and is again repeated below): that Officer Keller detected the smell of marijuana from the front of the house, rendering the argument about violating the curtilage moot. **But Keller did not detect the odor from the front of the house, and even if Keller was, he was trespassing**, which renders such a search unconstitutional (see below).

Finally, the Court of Appeals concluded that Det. Henderson was not within the curtilage, and therefore the undisputed trespass does not matter. But in a footnote, the court acknowledged and dismissed Mr. Towne's argument that to get to the point of observation, he had to cross the curtilage. The Court of Appeals, citing *Frederick*, found that such a crossing does not violate the Fourth Amendment because it was not for information-gathering purposes (see above). First, it was for information gathering

purposes: to determine if Mr. Towne's son was escaping the home through the back. It is a narrow conception of "information gathering" to compare a police officer strolling through a neighborhood and cutting across someone's lawn to a police officer setting up a perimeter after a knock-and-talk failed to obtain consent so he can await an alleged fugitive while his partners obtain a search warrant.

The Court of Appeals did not properly apply *Frederick* and continued errors from its original analysis. Reversal is appropriate.

VI.D The Fourth Amendment protects against searches without probable cause and within the curtilage of a home.

The Fourth Amendment of the United States Constitution and Article 1, § 11 of the Michigan Constitution protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, Art 1 § 11.1. Also, a search without a warrant is presumptively unreasonable unless the search falls into an enumerated exception. *People v Borchard-Ruhland*, 460 Mich 278, 293 (1999). Both the Michigan and United States Constitutions afford protection against unreasonable and, therefore, unconstitutional searches. *People v Champion*, 452 Mich 92, 98 (1996); *People v Levine*, 461 Mich 172, 178 (1999). Further, evidence obtained as a result of an unreasonable search or seizure is inadmissible in a criminal proceeding. *Mapp v Ohio*, 367 US 643, 655 (1961); *People v Cartwright*, 454 Mich 550, 558 (1997).

Exigent circumstances are an exception to the warrant requirement: "When the 'exigencies of the situation' make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v*

Arizona, 437 US 385, 394 (1978). Case law defines exigent circumstances as “*situations where ‘real immediate and serious consequences’ will ‘certainly occur’* if the police officer postpones action to obtain a warrant.” *United States v Watson*, unpublished opinion, issued July 26, 2012 (Docket No. 11-1331) (citing *Thacker v City of Columbus*, 328 F3d 244, 253 (CA6 2003) (quoting *Ewolski v City of Brunswick*, 287 F3d 492, 501 (CA6 2002)) (emphasis added). However, even if the search falls into one of the enumerated exceptions, the search must still be reasonable and based on probable cause. *Cartwright* at 558.

The legal challenge in this case focuses on the probable cause requirement and violations of the curtilage in the absence of a search warrant. “The U.S. Supreme Court has extended Fourth Amendment protections to the home’s curtilage, the land surrounding and associated with the home.” *Hardesty v Hamburg Township*, 352 F Supp 2d 823 (2005) (citing *Oliver v United States*, 466 US 170, 180 (1984)); *Jacob v Township of West Bloomfield*, 531 F3d 385 (CA6 2008). Further, there is a four factor test “to determine whether an area is ‘so intimately tied to the home’ that the area is considered to be part of the home’s curtilage.” Those factors are:

1. The proximity of the area claimed to be part to be curtilage to the home,
2. Whether the area is included within an enclosure surrounding the home,
3. The nature of the uses to which the area is put, and
4. The steps taken by the resident to protect the area from observation by people passing by.

Hardesty 352 FSupp2d at 828 (citing *United States v Dunn*, 480 US 294, 301 (1987)).

"Courts have interpreted th[e] [Fourth Amendment] right as extending to the curtilage of the home because individuals possess a 'reasonable expectation of privacy' in the area surrounding and appurtenant to the home." *Daughenbaugh v City of Tiffin*, 150 F3d 594, 598 (CA6 1998) (citing *United States v Reilly*, 76 F3d 1271, 1275 (CA2 1996)). "In expanding upon the general principles governing Fourth Amendment jurisprudence, the Supreme Court has observed that 'the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself.'" *Daughenbaugh*, 150 F3d at 598 (citing *United States v Dunn*, 480 US 294, 300 (1987)).

VI.E The Court of Appeals Made a Serious Factual Error that Mangled Its Legal Analysis

Before analyzing Mr. Towne's case step-by-step, it is important to identify a factual error in the Court of Appeals' original opinion that led inexorably to a legal error in its analysis. This factual error was discussed at oral argument and appears in the court's Opinion on page 4 and is repeated in the remand Opinion:

While it is true that, after Sura and Pendergraft left the residence, **Keller eventually detected the odor of marijuana, smelling marijuana from his patrol vehicle in front of the residence** 45 or 50 minutes later, that had absolutely nothing to do with his walking to the back of defendant's residence allegedly in violation of defendant's constitutional rights.

(emphasis added).

This bolded statement is false and contrary to the record evidence. The source of the odor of marijuana ***was not from any officer in the front of the residence but from Trooper Henderson in the backyard alone.***

The court identified no record evidence for the source of the erroneous idea that Keller smelled the marijuana from the front of the house. A review of the evidentiary hearing reveals the following record evidence (including the arguments of counsel) about the source of the odor of marijuana. These references are to the February 26, 2013 Evidentiary Hearing, but are not necessarily direct quotes:

Trooper Henderson stood in the backyard for 45 minutes and he claimed to have detected an odor of marijuana.

Argument of Counsel, p. 21; see also, pp. 22, 33.

The odor was not detectable inside the house.

Testimony of Mr. Towne, p. 35.

While he was seeking a warrant to search the home for Richard Towne, Pendergraft testified that Henderson called:

A He [Henderson] called me and he said he was standing out back and he's looking into the house and from what he could tell it looked like Mr. Towne was literally shoveling marijuana into the fireplace. The fireplace had gone from a little lit to extremely lit and that he could smell it outside.

Q Smell what outside?

A The odor of marijuana being burned.

p. 69.

After Henderson's call, Pendergraft switched gears and got a search warrant for marijuana based on "Trooper Henderson's observations."

p. 70.

Even the Prosecution argued only that Henderson was in place to smell and view marijuana:

And that's what I'm asking the Court to find is that when Trooper Henderson stood there and as the Defendant was burning the marijuana in the fireplace so that he was spreading the smell so the world could see and the officer began to see the glow and ran up and saw him shoveling the marijuana into the fireplace, that Trooper Henderson was in a place he had a lawful right to be under McArthur regardless of whether you find it curtilage or not.

p. 16; see also, p. 17.

There is no evidence to support the court's factual error

Repeating the erroneous factual statement, the court stated on page 4:

While it is true that, after Sura and Pendergraff left the residence, **Keller eventually detected the odor of marijuana, smelling marijuana from his patrol vehicle in front of the residence** 45 or 50 minutes later, that had absolutely nothing to do with his walking to the back of defendant's residence allegedly in violation of defendant's constitutional rights.

(emphasis added).

As described above the only evidence from the evidentiary hearing was unequivocal testimony that Tpr. Henderson *from his position in the backyard* was the sole source of the information about the marijuana smell and the fireplace.

The Court of Appeals was indisputably wrong.

Even the *Prosecution* never asserted the idea that Keller or anyone else smelled the marijuana from the front of the house.

Troopers Pendergraff and Sura left the defendant's house to prepare a search warrant and affidavit, leaving Troopers Henderson and Keller behind. Trooper Keller watched from the driveway on the front garage-side of the house while Trooper Henderson took a position at the

edge of the woods at the rear of the house where he could observe the opposite side of the residence.

Pros. Brief p. 5 (p. 11) (record citations omitted).

After waiting in the woods for 45-50 minutes, Trooper Henderson observed “an extensive amount of smoke coming out of the chimney” that smelled like “freshly burned marihuana.” While smelling the plumes of marihuana smoke, Trooper Henderson saw the defendant’s living room get brighter and brighter and saw sparks fly from the top of the chimney.

As the light in the living room grew brighter and the smell of marihuana smoke grew stronger, Trooper Henderson became concerned that someone was destroying marihuana in the fireplace. Trooper Henderson immediately radioed Trooper Keller. Trooper Henderson then left his position in the woods and stepped on the back deck connected to the house and looked into the living room. He saw the defendant “literally shoveling, taking handfuls of marihuana from a plastic tote that was right to the ledge of where the fireplace is and throwing it into the fire.”

Trooper Henderson immediately called Trooper Pendergraff and told him what the defendant was doing. The two troopers concluded that the defendant’s actions created an exception to the search warrant requirement due to exigent circumstances, allowing immediate entry into the house to prevent the destruction of more marihuana.

After discussing the matter with Trooper Pendergraff, Troopers Henderson and Keller went around the house and began kicking the front door.

Pros Brief, pp. 6-7 (pp. 12-13) (record citations omitted). In its response to Mr. Towne’s Motion for Reconsideration, it could not identify any record evidence to the contrary.

What is the source of the court’s factual error? Because the court is not required to cite to the record in its opinions, it can be difficult to track down the source of any factual errors that might creep into its opinions. But after a thorough review of the record, Mr. Towne has a theory. At the Preliminary Examination, Henderson initially testified that, “I did two things. I immediately contacted Trooper Keller who was at

the front who detected the same thing [the odor of marijuana] oh yeah I –“⁹⁷ However, after objection and a long argument, Henderson clarified, “I contacted Trooper Keller, and if this eases the argument a little bit, he was in his vehicle which makes it a little more difficult to smell and see the obvious things that I was. **So Trooper Keller came around to the back and observed and detected the odor of marijuana as I did.**”⁹⁸

Therefore, the testimony did not support the court's finding.

And this factual error is the basis of the court's legal decision in the case. The court ultimately held:

On appeal, defendant argues that Sura's and Keller's actions, i.e., walking to the back of his residence during the knock and talk, violated his Fourth Amendment rights. Therefore, he claims, the marijuana evidence subsequently found in his residence should be suppressed and this case should be dismissed. **We disagree for one fundamental reason—Sura's and Keller's actions did not lead to the recovery of any evidence. Thus, the exclusionary rule is inapplicable. [*People v Reese*], 281 Mich App [290,] 295-296 [(2008)].**

The court brought something new to the case analysis by holding that there was a break in the causal chain of evidence gathering, citing *Reese*. The Prosecution never made this argument, and it should be waived. See Lower Court Briefing.

But even if the argument is not waived, Mr. Towne's only chance to address it was in his Motion for Reconsideration. He addresses it now, but if this Court finds it relevant, asks for an opportunity to expand on this argument. The court erected a line between the actions of Sura and Keller and the ultimate discovery of the marijuana.

⁹⁷ PE I, p. 32.

⁹⁸ PE I. p. 42 (emphasis added).

Relying on *Reese*, the court stated that an independent basis for a search saves the fruits of that search from the preceding, unrelated illegality.

There are two serious, dispositive problems with this argument. First, the factual error explained in detail above. *There was no independent basis because there is no record evidence that Keller smelled the marijuana from in front of the house.* The only record evidence is that Henderson smelled it from the backyard, which is intimately linked to all the arguments that Mr. Towne declines to reargue here, but requests that this Court reconsider: the violation of the knock-and-talk procedure, whether Henderson followed a path that the public would use (whether it is on the “south and east of defendant’s residence” as the Court of Appeals described it, it is still not somewhere Counsel, and Counsel suspects this Court, would be comfortable having people walking around if it was their backyard), the lack of any Fourth Amendment case law support for setting up a perimeter for a routine fugitive search, and the specific facts in this case that prove that there was no probable cause to believe that Richard Towne was in the home.

Second, by the court’s own terms in its own opinion, Keller was “in front of the residence,” which the court implies but never states was a legal location for the officer. The only evidence is to the contrary. As the court found, Mr. Towne’s home “sits in the middle of a wooded five-acre parcel.” Slip Opn., p. 5. At the Preliminary Examination, it was made clear that the Townes had a long driveway (they would have to for a home in the middle of five acres) and that Keller was sitting in his vehicle with a view of the

garage while waiting for Pendergraft to get the warrant.⁹⁹ The Prosecution stated for the record that Keller was in the driveway on the garage-side of the house. Pros. Brief p. 5 (p. 11). Keller was *not* on a public street observing the house; rather, he was on the Townes' property, in their driveway, observing the garage and front of the house for the very reason that the point of remaining behind was to observe the Townes' home.

But Mr. Towne had ordered them to leave his property prior to Henderson detecting the odor of marijuana.¹⁰⁰

So Keller was a trespasser at the point that the court found that his detection of the odor of marijuana broke the causal chain of illegality under the rule of *Reese*. As a matter of U.S. Supreme Court law, trespassing police cannot utilize the plain-view/plain-smell exception to the warrant requirement. *See Horton v California*, 496 US 128, 136 (1990). Keller could *not* have saved the search in this case because he was not legally present on the Townes' property to smell marijuana in the first instance.

VI.F The troopers did not possess a search warrant and could not search a third-party's home with an arrest warrant only. They needed consent, which they never got.

It is undisputed that the police did not possess a search warrant until *after* Trooper Henderson smelled the marijuana and *after* the police entered the home and performed a warrantless search.

The U.S. Supreme Court has held that the police require a search warrant in

⁹⁹ PE I 23, 27.

¹⁰⁰ PE II pp. 92-93.

addition to an arrest warrant to search a third-party's home for a suspect. *Steagald v United States*, 451 US 204 (1981). As discussed more below, without probable cause and exigent circumstances, any search of Mr. Towne's home would be unconstitutional under these circumstances.

Without probable cause and a warrant or exigent circumstances, the police can consensually contact citizens to seek permission for a search. A knock-and-talk procedure is one such sub-category of a consensual encounter between the police and a citizen. During a knock-and-talk, the police approach a citizen's home, knock, and seek consent to search.

Knock and talk, as accepted by this Court in *Frohriep*, does not implicate constitutional protections against search and seizure because it uses an ordinary citizen contact as a springboard to a consent search. *Frohriep*, *supra* at 697-698, 637 N.W.2d 562.

Galloway, 259 Mich App at 640.

Knock-and-talk procedures are only exempt from challenge as a consensual search if the knock-and-talk is properly executed within limited boundaries or not used for some purpose other than seeking consent to search.

VI.G If the police possessed probable cause or believed they possessed probable cause, the knock-and-talk procedure would be improper.

The police approached Mr. Towne's home to establish whether Richard Towne was there. They admittedly did not know whether he was there or not.¹⁰¹ They did not have probable cause to believe that Richard was there. Indeed, if they had probable

¹⁰¹ 3/26/2013 T, p. 107.

cause or thought they had probable cause, then the procedure that they used would have been improper:

No warrant is required to “knock and talk.” At the same time, police officers who possess probable cause cannot avoid their obligation to obtain a warrant by creating exigent circumstances.

United States v McGrath, 65 FAppx 508 (CA5 2003); *See also, e.g., Kentucky v King*, 563 US 452; 131 S Ct 1849, 1858; 179 L Ed 2d 865 (2011).

The police cannot manufacture an exigent circumstance (securing a home to prevent escape or for the safety of officers or while awaiting a search warrant) where they already possess probable cause but must seek a search warrant from a magistrate.

VI.H The knock-and-talk was unconstitutional because the police did not restrict their movements to public access areas; instead, they invaded the curtilage (backyard).

Defendant immediately answered the door when the troopers knocked.¹⁰² The troopers had no right, *contemporaneous* with their knock at the front door, to walk around the side of the residence, enter onto the deck attached to the home, and shine a flashlight into the living quarters of the home. Nor to traverse the backyard to a maintained portion of the curtilage. Entering the rear, backyard, and deck of the home is not permissible activity. *Hardesty v Hamburg Township*, 352 F Supp 2d 823 (2005).

As the court stated in *Galloway*, police may travel along the paths that the public would be expected to use:

It is not objectionable for an officer to come upon that part of the property which “has been opened to public common use.” The route which any

¹⁰² 3/26/2013 T, pp. 18, 64.

visitor to a residence would use is not private in the Fourth Amendment sense, and thus if police take the route “for the purpose of making a general inquiry” or for some other legitimate reason, they are “free to keep their eyes open,” and thus it is permissible for them to look into a garage or similar structure from that location. [*Houze, supra* at 92 n. 1, 387 N.W.2d 807, quoting 1 LaFave, *Search & Seizure*, § 2.3, p 318.]

Id. at 642, n. 3.

As one court explained, the police can *only* move in areas that the public would access:

Whether an officer is where he has a right to be when he does the knock and talk is defined by his limited purpose in going to the residence and the nature of the area he has invaded. There has been no finding of probable cause sufficient to grant a warrant, **so the knock and talk is limited to only the areas which the public can reasonably expect to access.** While there is a right of access for a legitimate purpose when the way is not barred, or when no reasonable person would believe that he or she could not enter, this right of access is limited. The resident's expectation of privacy continues to shield the curtilage where an outsider has no valid reason to go. Thus any part of the curtilage may be protected, including driveways, depending on the circumstances of each case. *United States v. Smith*, 783 F.2d 648 (6th Cir.1986)

Quintana v Com., 276 SW3d 753, 759 (Ky 2008) (emphasis added); *see also United States v Shuck*, 713 F3d 563, 567 (CA10 2013) (holding that “the ‘portion of the curtilage’ that is ‘the normal route of access for anyone visiting the premises’ is only a ‘semi-private area’ on which police may set foot if they ‘restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches).’ 1 Wayne R. LaFave et al., *Search & Seizure* § 2.3(f) (5th ed., 2012 update) (footnotes omitted)).

Compare the facts in Mr. Towne's case to the *Radant* case. In *People v Radandt*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 2, 2014 (Docket Nos. 314337, 314431), the Court of Appeals upheld over a dissent the trial court's denial

of a motion to suppress evidence in a knock-and-talk issue. But the differences in the facts of *Radandt* are pleasantly illuminating from Mr. Towne's perspective. In *Radandt*, the Court noted that the police decided to move to the rear of the home "after receiving no response at the first direct entrance to the home", which the court found to be reasonable. But, as emphasized above, the facts developed during the evidentiary hearing in Mr. Towne's case were undisputed that the officers did *not* wait to move into the backyard after receiving no response; in fact, the officers *immediately* split up and approached both the front and back of the house and, further, the officers at the front of the house *were greeted by Mr. Towne*, vitiating any "need" to go to the back of the house. Mr. Towne would recommend the reasoning of the dissent in *Radandt*, but even under the reasoning of the majority, Mr. Towne would be protected under the rule set out by *Radandt*.

Simply, without other legal justification, the police cannot stray from the boundaries that the public would normally take to have a similar consensual encounter with the same citizen. As soon as Keller and Sura arrived at Towne's house, they circled around and into Towne's backyard. *Skulking around the back of a home, during a power outage, to shine a flashlight into the family room from the backyard deck is not movement along normal public routes of access.* The police actions were unconstitutional.

Further, Henderson violated Towne's Fourth Amendment rights in two ways: (1) He walked through Towne's backyard while making his way towards the back of Towne's house; and (2) He stood within Towne's private curtilage when he finally got

to the spot where he stopped to wait for the search warrant.

Knock-and-talk does not permit these curtilage violations.

VI.I Following the conversation with Dennis and Judith Towne, the troopers lacked probable cause to believe that Richard Towne was inside the home.

“The police may not enter a private residence without a warrant unless BOTH ‘probable cause PLUS exigent circumstances’ exist.” *United States v McClain*, 430 F3d 299, 304 (CA6 2005) (citing *Kirk v Louisiana*, 536 US 635, 638 (2002) (per curiam) and *United States v Chambers*, 395 F.3d 563, 572 (CA6 2005)). Probable cause exists where, given the totality of the circumstances, there is a *reasonable* grounds for the belief of wrongdoing, which is “supported by less than prima facie proof but *more than mere suspicion*.” *United States v Brown*, 449 F3d 741, 745 (CA6 2006) (emphasis added).

Further, case law is clear that a mere *speculation* is not enough to form probable cause. There must be *reasonable and articulable facts* to support the assertion; a mere suspicion is not enough. Inarticulable “hunches” do not equal reasonable suspicion, let alone probable cause. *United States v Wardlow*, 528 US 119, 123-124 (2000).

Following the knock-and-talk, the troopers were left with *much less* reason to believe that Richard Towne was at that address even than before they had arrived. When the troopers arrived at Towne’s home, they knew only what Richard Towne looked like, that he had lived at that address 4-5 years prior, that he had an old car registered to him that was sitting to the side of the driveway, and knew that someone had allegedly seen him in the area within the past month or six weeks. However, none of the troopers had personally seen Richard at Mr. Towne’s address. Further, they

knew that Richard Towne had a different address on his license, they knew Richard Towne had lived at several other addresses in the past five years, and they were unaware how accurate their CLEMIS information was. This is the totality of the information that the troopers arrived with.

After talking to Towne for 20 minutes, they knew several additional facts: that Towne and his wife, Judith, repeatedly stated Richard wasn't there; that the troopers hadn't seen Richard; that the troopers hadn't heard anyone they believed to be Richard; that nobody had made any furtive gestures; and that the vehicles registered to Richard hadn't been used in a long time. In short, *not one real time fact supported an assertion that Richard Towne was in that house*. In fact, while they were waiting for the warrant to arrive, the troopers stayed at the address for approximately 3-4 hours, and *not one fact emerged to make any rational person believe that Richard Towne was in that home*. In other words, the troopers had *less* reason to suspect that Richard Towne was in that home after being there for over three full hours, than they had before they arrived – much less than probable cause.¹⁰³

Yet, the troopers weren't satisfied – they told Towne that if he did not consent to a search that they were going to stake out his home and await a search warrant. And this is precisely the problem: *The troopers weren't satisfied that Mr. Towne did not give consent, and they weren't going to be satisfied until they had searched his*

¹⁰³ Additionally, the argument that Trooper Pendergraff attempted to make at the Preliminary Examination regarding the safety of Richard Towne and or members of public “if [Richard] takes off outside of the house” and “into the woods” is all pure speculation. The troopers didn't have probable cause to believe that Richard Towne was even *inside the house*. It is therefore axiomatic that they could not have probable cause to believe that he was a risk.

home. Nothing that Mr. Towne could have said would have assuaged the troopers; they were going to search his home, with or without his consent – despite the fact that there was not a scintilla of evidence, after speaking with Towne, to believe that Richard Towne was there.

The troopers had merely a hunch that Richard Towne was inside that home, and not even a reasonable one. They did not possess probable cause to believe that Richard Towne was located at that home, yet they violated his curtilage regardless.

VI.J There were no exigent circumstances

In addition to the absence of probable cause to believe that Richard Towne was located at the home, there were no exigent circumstances that existed that would allow the troopers to walk through Dennis Towne's curtilage or park themselves within his curtilage in the back of his house.

Exigent circumstances are those in which the urgent need for immediate action becomes too compelling to impose upon governmental actors the attendant delay that accompanies obtaining a warrant. *See DeMayo v Nugent*, 517 F3d 11, 15 (CA1 2008); *McClish v Nugent*, 483 F3d 1231, 1240-41 (CA11 2007); *United States v Marshall*, 157 F3d 477, 482 (CA7 1998). Thus, in assessing the constitutionality of a warrantless search, the inquiry is whether the circumstances give rise to an objectively reasonable belief that there was a compelling need to act and insufficient time to obtain a warrant. *See United States v Bell*, 500 F3d 609, 613 (CA7 2007). The exigency of the circumstances is evaluated based upon the totality of the circumstances known to the governmental actor at the time of the entry. *See United*

States v Atchley, 474 F3d 840, 850 (CA6 2007); *United States v Maldonado*, 472 F3d 388, 395 (CA5 2006); *United States v Brown*, 449 F3d 741, 745 (CA6 2006); *United States v Hernandez Leon*, 379 F3d 1024, 1029 (CA8 2004). Mere speculation is inadequate; rather, the State must rely upon specific and articulable facts and the reasonable inferences drawn from them. See *Bailey v Newland*, 263 F3d 1022, 1033 (CA9 2001); *United States v Anderson*, 154 F3d 1225, 1234 (CA10 1998); *United States v Reid*, 226 F3d 1020, 1028 (CA9 2000); *United States v Licata*, 761 F2d 537, 543 (CA9 1985). The circumstances are viewed from an objective perspective; the governmental actor's subjective intent is irrelevant. See *United States v Uscanga-Ramirez*, 475 F3d 1024, 1028 (CA8 2007). The manner and the scope of the search must be reasonably attuned to the exigent circumstances that justified the warrantless search, or the search will exceed the bounds authorized by exigency and probable cause alone. See *Mincey v Arizona*, 437 US at 393 (quoting *Terry v Ohio*, 392 US at 25-26). Where the asserted ground of exigency is risk to the safety of the officers or others, the governmental actors must have an objectively reasonable basis for concluding that there is an immediate need to act to protect themselves and others from serious harm. See *United States v Snipe*, 515 F3d at 951-52; *United States v Layman*, 244 Fed Appx 206, 210 (CA10 2007); *United States v Huffman*, 461 F3d at 783; *United States v Williams*, 354 F3d 497, 505 (CA6 2003).

First, as for the smell of burning marijuana, it does not justify a warrantless search. *Johnson v United States*, 333 US 10 (1948) (warrant needed when officer smells burning opium). In addition, as explained above, Trooper Henderson was only in a

position to smell the marijuana because of his unconstitutional violation of the curtilage.

But the main justification for the violation of the curtilage was the “exigent circumstance” of pursuing a fugitive felon and securing the home. **There is no law that supports the proposition that a standard felony fugitive search permits the police to surround homes or violate the curtilage.** In *Ohio v Rodriguez*, 2013 Ohio 491 (Ohio Ct App 2013), the Court of Appeals of Ohio recently analyzed this sort of standard fugitive search as distinguished from the exception for the pursuit of a felon. The court determined that there was no exigency even though police had received an anonymous tip that a fugitive, Colon, would be located at a house, combined with officers seeing a male run down the stairs, cross in front of the window, run back upstairs, and heard a window open. The court held,

In this case, it was represented that the U.S. Marshals had a "memorandum" that gave them the authority to go looking for Colon. Even assuming that an arrest warrant was actually issued, the state failed to establish there was a reasonable belief that Colon was within the subject residence. The only evidence presented was testimony that the U.S. Marshals "had a tip that [Colon] was possibly at that residence." Nothing was provided as to the details of the tip or to establish its reliability. Nor was it shown that any steps were taken to independently corroborate the tip. Further, Ruiz testified that Colon was not at her home. She further indicated that her daughter and Colon had been boyfriend and girlfriend, but Colon had been at her home only two or three times, a long time ago. Thus, it was never established that Colon frequented this location. Under these circumstances, the officers did not have reason to believe that Colon would be found within the home.

Id. Based upon this foundation, the Court determined that no exigency existed.

The situation that Keller, Sura, and Henderson were involved in was not an

exigency. First, there is no indication that there was an exigency before the troopers went to the Towne home. The troopers discussed Richard Towne before they went to the home, they knew who they were looking for and they decided *not* to get a search warrant prior to arriving at the home. It was *not* an exigent circumstance before they arrived and it didn't turn into an exigent circumstance simply because Mr. Towne refused to allow them to search his home. In fact, any alleged exigency was artificially manufactured by the troopers after the fact. They went to the Towne home simply to talk to the Townes and inquire whether Richard was there and when they didn't get the answer that they wanted they requested to search and, again, when they didn't get the answer they wanted, they created the exigency and repeatedly violated the curtilage (although, as discussed *supra*, they had already violated the curtilage by going onto the back deck and shining their flashlights into the back windows almost as soon as they arrived at the home.)

Second, there are *no* facts that support the assertion that, had the troopers *not* gone around back, Richard Towne would have “escaped.” This was not a “situation where ‘real immediate and serious consequences’ [would] ‘certainly occur’ if the police officer[s]” had waited to obtain the warrant before going through and into Towne’s “backyard.” In fact, there was only supposition to support the hunch that Richard Towne was even in the house, much less that he would “*certainly*” escape if the troopers hadn’t gone around to the back of the house.

Lastly, pursuit of a felon is an exception to the warrant requirement, but **routine fugitive felon searches are *not* exceptions to the warrant requirement.** See *Steagald*

v United States, 451 US 204 (1981) (holding that the search that took place in this case was “routine,” not based upon exigency). In *Steagald*, police officers were armed with an arrest warrant for a Mr. Lyons and went to the home of a third party in order to seize Mr. Lyons. When officers arrived at the home, they went inside and searched for Mr. Lyons – whom they subjectively feared would flee. Instead of finding Mr. Lyons, officers found 43 pounds of cocaine. The homeowner was charged with possession of cocaine and filed a motion to suppress on the basis of an illegal search. Importantly the Court stated, “We have long recognized that . . . ‘hot pursuit’ cases fall within the exigent circumstances exception to the search warrant requirement . . . and therefore are distinguishable from the *routine* search situation presented here.” *Id.* at 218. (emphasis added).

The situation in the case at bar is equally *routine*. The troopers were not in hot pursuit of Richard Towne; they had not seen him and there were no facts to support any assertion that he was at the home. Yet, the troopers violated Towne’s curtilage and walked around to the back of the house, stood on the back deck, and parked themselves in the front and backyard of Towne’s home. This was a routine search, not an exigent circumstance.

The court in *Galloway* cautioned against using the “knock-and-talk” label to insulate unconstitutional search procedures:

When a knock and talk is used as a springboard for obtaining something other than consent to a search, the constitutional framework changes. Merely characterizing a law enforcement maneuver as a knock and talk does not warrant judicial bypass of constitutional safeguards against unreasonable searches and seizures. As this Court prophetically observed in *Frohriep*, *id.* at 701, 637 N.W.2d 562, “we can envision a

situation where the police conduct when executing the knock and talk procedure indicates an unreasonable seizure or results in an unreasonable search....”

Galloway, 259 Mich App at 643. The police here should not be allowed to “merely characterize” their conduct as a knock-and-talk, when it was a routine investigatory search.

VI.K “In order to search for the subject of an arrest warrant in the home of a third party, a search warrant must be obtained, absent exigent circumstances or consent.” *Steagald v United States*, 451 US 204 (1981)

The majority of the Prosecution's response in the trial court focused on the argument that the Supreme Court in *Illinois v McArthur*, 531 US 326 (2001), permits the curtilage violation because troopers “have a right to remain and secure that residence to prevent the destruction of evidence while a search warrant is procured.”¹⁰⁴ *McArthur* is irrelevant to the inquiry that the case at bar presents. Specifically, *McArthur* held that the police could seize a person for a brief period of time while awaiting a warrant, where the police actually had probable cause to believe that the individual they seized would destroy evidence inside of his trailer. The situation in *McArthur* is not the situation in the case at bar.

First, in the lower court, the Prosecution improperly inserted “escape of a dangerous felon” into the holding of the *McArthur* Court. *Nowhere* within *McArthur* does the Court discuss the applicability of their decision as it applies to Fourth Amendment violations with respect to potential escaping felons. It dealt with the destruction of evidence.

¹⁰⁴ See Prosecution's Brief In Response to Defendant's Motion to Suppress, Page 9.

Second, *McArthur* involved the brief detention of McArthur in order to prevent him from entering his own home. Further, he was detained because the police had been informed (via his wife) that he had drugs in the home. In other words, the police had probable cause to believe that there were drugs in the home and McArthur was going to enter his trailer and destroy the drugs, so they detained him for a short period. These facts are wildly different from the case at bar, where *at the time the troopers violated the curtilage*, they did not have probable cause to believe that Richard Towne was in the house and had no reason to believe that any evidence was at risk.

The troopers went to Dennis Towne's home because of an *arrest* warrant, and absent (1) probable cause to believe Richard Towne was inside and (2) exigent circumstances, or (3) consent from Dennis Towne, the troopers violated his Fourth Amendment curtilage rights and searched his back deck, his backyard, and subsequently his home. *Galloway* and *Steagald* are directly on point and the troopers did not have the right to violate the curtilage without a search warrant (which they did not possess). This result may have been different if they had had an arrest warrant for Dennis Towne himself – as then this case would more closely align with *McArthur*. However, the troopers were searching for Richard, therefore causing Dennis Towne (and his home) to be in the position of a third party vis-à-vis the warrant. Pursuant to *Steagald*, “*In order to search for the subject of an arrest warrant in the home of a third party, a search warrant must be obtained, absent exigent circumstances or consent.*” *Steagald v United States*, 451 US 204 (1981) (emphasis added).. In this instance, there was no search warrant, no exigent circumstances, and no consent. Therefore, the

search was illegal.

VI.L The Good Faith Exception Does Not Apply in this Case

This Court has ordered briefing on the good faith exception in some of the other knock-and-talk cases previously before it. No such mandate was part of the original remand order in Mr. Towne's case. Nevertheless, Mr. Towne believes it appropriate to inoculate his case from this issue with a couple words on the topic.

First, the good faith exception has never been argued by the Prosecution and would thus be waived. As this Court has written:

The dissent contends that the defendant waived any sentencing error. However, this theory was never raised by the prosecution. Failure to brief an issue on appeal constitutes abandonment. *Mitcham v. Detroit*, 355 Mich. 182, 203, 94 N.W.2d 388 (1959).

People v McGraw, 484 Mich 120, 131 (2009).

Second, the good faith exception is a judicial exception to the exclusionary rule that salvages searches based on invalid or illegal warrants. In *United States v Leon*, 468 US 897, 920-21 (1984), the Supreme Court held that when a law enforcement officer acts within the scope of, and in objective, good-faith reliance on, a search warrant obtained from a judge or magistrate, there is no deterrent effect from exclusion of the evidence. Therefore, good faith reliance on such a warrant removes it from the scope of the exclusionary rule.

Therefore, the good faith reliance issue is only advanced when a defendant argues that the warrant is invalid or illegal. The defendant argues that the warrant is invalid or illegal, and the prosecution counters that the police officer acted in good

faith because he or she relied on the magistrate's decision in issuing the warrant, therefore the evidence from the search should not be suppressed.

Because Mr. Towne has not argued in this case that the arrest warrant in this case was invalid or illegal, there is no basis for the Prosecution to assert a good faith exception. It is simply irrelevant under the facts and legal theories presented in Mr. Towne's case.

VII. Conclusion

Evidence seized in violation of the Fourth Amendment must be suppressed. *Mapp v Ohio*, 367 US 643 (1961); *People v Cartwright*, 454 Mich 550, 558 (1997)

Defendant, Dennis Towne, prays that this Court reverse the decision of the trial court, permit Mr. Towne to withdraw his plea, suppress the evidence seized in violation of Mr. Towne's Fourth Amendment rights, and remand for dismissal or, in the alternative, further proceedings.

Respectfully submitted,
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